



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 152 OF 2002

IN THE MATTER OF THE ESTATE OF CHERUIYOT KIMILOT (DECEASED)

AND

IN THE MATTER OF TAXATION OF COSTS

BETWEEN

MICHAEL KIMAIYO.....APPLICANT

AND

DAVID CHERUIYOT KIMILOT.....RESPONDENT

RULING

[1] The Notice of Motion dated **8 June 2018** was filed herein by the law firm of **Manani Lilan Mwetich & Company Advocates** on behalf of the Applicant pursuant to **Paragraph 11(2) and (4)** of the **Advocates Remuneration Order** and **Order 50 Rule 6** of the **Civil Procedure Rules**. It prayed for orders that time to lodge a reference against the decision of the Taxing Officer made on **17 April 2018** be enlarged; and that there be a stay of execution for the taxed costs herein pending such reference. It was also prayed that the costs of the application be provided for.

[2] That application was premised on the grounds that the Ruling on Taxation was delivered *ex parte* and without notice; and therefore that the Applicant was not aware of the date of Ruling or the Ruling itself. It was further the contention of the Applicant that he is not satisfied with the Ruling and that since time for filing a reference had already passed by, his only recourse is for leave to be granted by this Court for enlargement of time. He posited that he stands to suffer substantial loss should he be subjected to execution without being accorded an opportunity to challenge the Ruling on Taxation. The said grounds were explicated in the Applicant's affidavit sworn on **8 June 2018** annexed to the application.

[3] The application was opposed by the Respondent vide the Replying Affidavit of **27 June 2018**. The Respondent's contention was that a notice of the Ruling on Taxation was duly given; and that, in any case, it was incumbent upon the Applicant to act promptly, which he failed to do. The Respondent accordingly urged for the dismissal of the instant application.

[4] The application was urged by way of written submissions which were filed herein by Learned Counsel for the parties on **14 August 2018** and **28 August 2018**, respectively. According to Counsel for the Applicant, **Mr. Mwetich**, the issues for determination herein are: whether there was failure to issue notice of ruling; whether the Applicant lost the right of reference; and whether the delay in filing the reference is inordinate. In his submission the Deputy Registrar gave directions on **11 October 2017** that submissions be filed by the parties in respect of the taxation. The Court thereafter mentioned the matter on **27 February 2018** and directed that it would issue a mention notice of the ruling to the parties; and that the Applicant waited in vain and was only surprised to receive a letter from the Respondent 23 days after the ruling informing him of the delivery of the ruling. According to **Mr. Mwetich**, by that time, the 14 days period prescribed by law for serving a notice under Paragraph 11 of the Advocates Remuneration Order had lapsed.

[5] It was further the submission of **Mr. Mwetich** that the instant application was brought without undue delay and urged the Court to be guided by the decision of the Court of Appeal in **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR** as to the factors to take into account in ascertaining whether or not there was inordinate delay. He also posited that no prejudice will be suffered by the Respondent should the application be allowed.

[6] **Mr. Nyamweya** for the Respondent relied on the written submissions filed on behalf of the Respondent on **14 August 2018** and urged

the Court to note that, in spite of the admission by the Applicant that his Advocates, **M/s Manani Lilan Mwetich & Company Advocates**, received a letter dated **10 May 2018** informing them that the ruling had been delivered, no action was taken by the Applicant until **8 June 2018**, when the instant application was filed. According to him, that is a clear indication of indolence on the Applicant's part which should not be condoned, more so because no explanation was given by the Applicant to convince the Court as to why it took him a whole month to file the instant application. Thus, Counsel for the Respondent urged for the dismissal of the application with costs.

[7] A perusal of the record confirms that the parties did appear before the Deputy Registrar on **11 October 2017** with a view of recording a consent on the Respondent's Bill of Costs; and that, as the parties were unable to reach a settlement, directions were given by the Deputy Registrar for the taxation to be done by way of written submissions. The matter was scheduled for mention on **7 November 2017** for a ruling date. The record further shows that neither the Applicant nor the Respondent was present on **7 November 2017**. However, **Mr. Nyamweya** was present and he urged the Deputy Registrar to note the absence of Counsel for the Applicant and proceed to allow the Bill of Costs as presented, granted the failure by the Applicant to file his written submissions. Consequently, the Deputy Registrar made an order that ruling would be delivered on **21 November 2017**.

[8] The Ruling on Taxation was ultimately delivered, not on **21 November 2017** as had been scheduled, but on **17 April 2018**. It was delivered in the absence of all the parties and there is no indication that Notice of Delivery of Ruling was ever given by the Deputy Registrar for **17 April 2018**. There is therefore no reason to doubt the Applicant's contention that his Advocates got to know of the delivery of the ruling for the first time when they received the letter dated **10 May 2018**. In the premises, it is manifest that the Applicant could not have exercised his right to commence the reference process within the 14 day window prescribed by **Paragraph 11** of the Advocates Remuneration Order. That provision stipulates that:

"(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be made notwithstanding that the time sought to be enlarged may have already expired."

[9] In my view therefore, a justifiable cause has been shown why the requisite notice under **Paragraph 11(1)** of the **Advocates Remuneration Order** could not be issued within the 14 day window prescribed thereunder. Accordingly, I would allow the application dated **8 June 2018** and extend the time for purposes of **Paragraph 11(1)** as prayed, being satisfied as I am that the delay in bringing the instant application was not at all inordinate in the circumstances. Thus it is hereby ordered that:

[a] There be stay of execution for costs herein pending the proposed reference by the Applicant;

[b] That the period for filing a Notice of Objection to the Taxing Officer pursuant to **Paragraph 11(1)** of the **Advocates Remuneration Order** be and is hereby extended by 14 days from the date hereof.

[c] That each party shall bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT ELDORET THIS 7TH DAY OF MARCH 2019

OLGA SEWE

JUDGE